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Epic Games, Inc.*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

EPIC GAMES, INC.,

Plaintiff, Counter-defendant,

v.

APPLE INC.,

Defendant, Counterclaimant.

No. 4:20-CV-05640-YGR-TSH

**DECLARATION OF NATHAN E.
DENNING IN SUPPORT OF
PLAINTIFF EPIC GAMES, INC.'S
OPPOSITION TO DEFENDANT
APPLE, INC.'S MOTION FOR PRE-
TRIAL SANCTIONS**

Date: April 13, 2021, 2 p.m.

Courtroom: 1, 4th Floor

The Honorable Yvonne Gonzalez Rogers

1 I, Nathan E. Denning, declare as follows:

2 1. I am an attorney licensed to practice in the State of New York and admitted to
3 appear before this Court *pro hac vice* in *Epic Games, Inc. v. Apple Inc.*, Case No. 4:20-cv-05640-
4 YGR. I am Counsel at the law firm of Wiggin and Dana LLP and am one of the attorneys
5 representing Epic Games, Inc. (“Epic”) in the above-captioned action.
6

7 2. I submit this declaration in support of Epic’s Opposition to Apple Inc.’s (“Apple”)
8 Motion for Pre-Trial Sanctions Against Epic in this matter. (“Apple’s Motion”, ECF No. 419.)
9 The contents of this declaration are based on my personal knowledge. If called to be a witness, I
10 could and would testify competently thereto.

11 3. A true and correct copy of Apple’s document subpoena to Facebook, Inc.
12 (“Facebook”), dated December 9, 2020, is attached hereto as **Exhibit A**.
13

14 4. A true and correct copy of Apple’s supplemental document subpoena to Facebook,
15 dated December 30, 2020, is attached hereto as **Exhibit B**.

16 5. Facebook’s document production in this case consisted of 1,677 documents
17 (11,755 pages).

18 6. From at least January 15, 2021, until the afternoon of March 12, 2021, Epic’s
19 counsel engaged in discussions with Facebook’s counsel to try to get Facebook’s agreement to
20 make a witness available for trial. During those discussions, Facebook’s counsel stated that
21 Facebook could not confirm whether it would make a witness available for trial. Further,
22 Facebook’s counsel stated that Facebook could not identify who it would make available as a
23 witness for trial, in the event Facebook made a witness available at all.
24

25 7. On March 3, 2021, Epic’s counsel asked Facebook’s counsel whether Facebook
26 would be willing to make available as a witness one of the individuals for whom Facebook had
27 produced documents (Mr. Vivek Sharma included). Facebook’s counsel responded that Facebook
28

1 was still not able to commit to making a witness available for trial or whether, if it did so, the
2 witness would be among those identified in Facebook's document production.

3 8. On March 9, 2021, Facebook's counsel informed Epic's counsel that Facebook
4 still could not commit to making a witness available for trial. Facebook's counsel further
5 indicated that if Facebook were to make a witness available, then the witness would likely be
6 Mr. Sharma or one of the other individuals identified in Facebook's document production.
7

8 9. Epic's counsel did not learn that Facebook would be willing to make a witness
9 available, or who that witness would be, until approximately noon (PT) on March 12, 2021, when
10 Facebook's counsel informed Epic's counsel that Facebook had decided to make Mr. Sharma
11 available. That same day, Epic disclosed to Apple that Mr. Sharma was available to testify at trial
12 by listing Mr. Sharma on Epic's initial trial witness list.
13

14 10. On March 18, 2021, Apple served a notice of Mr. Sharma's deposition, in
15 accordance with the agreement reached by the parties with respect to third-party witnesses not
16 previously deposed. The notice identified a deposition date of April 12, 2021.

17 11. Prior to the filing of Apple's Motion, Facebook's counsel informed me that
18 Mr. Sharma's deposition was scheduled for April 28, 2021.

19 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true
20 and correct and that I executed this declaration on April 12, 2021, in Brooklyn, New York.
21

22
23 /s/ Nathan E. Denning
24 Nathan E. Denning
25
26
27
28

FILER'S ATTESTATION

I, J. Wesley Earnhardt, am the ECF User whose ID and password are being used to file this Declaration of Nathan E. Denning in Support of Epic Games, Inc.'s Opposition to Apple Inc.'s Motion for Pre-Trial Sanctions. In compliance with Civil Local Rule 5-1(i), I hereby attest that concurrence in the filing of this document has been obtained from the signatory.

By: /s/ J. Wesley Earnhardt

J. Wesley Earnhardt